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No. 87-1953

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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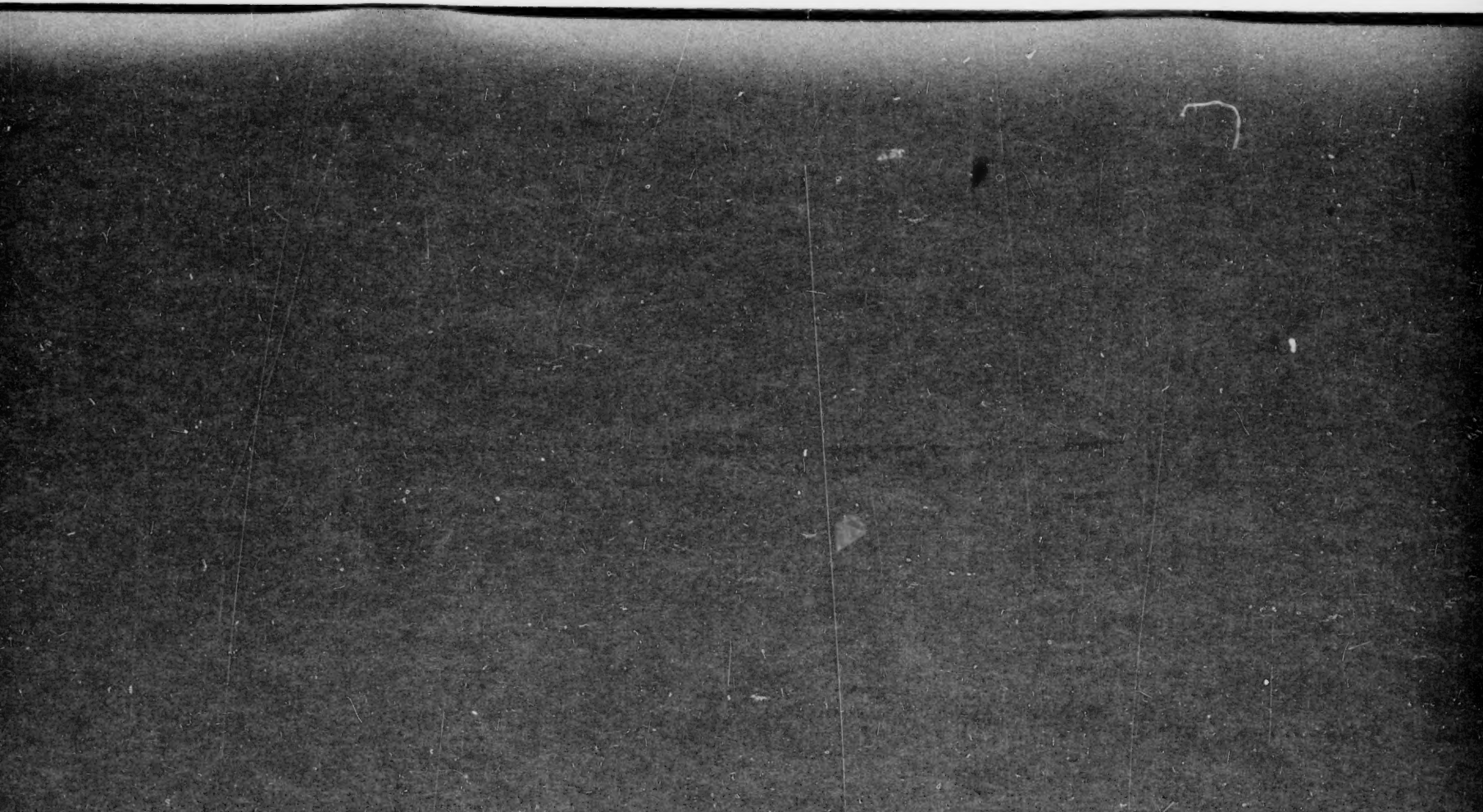

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit sitting in diversity correctly construed the terms of an insurance contract under Missouri law?

RULE 28.1 LISTING

The Continental Corporation
AFCO Acceptance Corporation
AFCO Agent Service Corporation
AFCO Credit Corporation
AFCO Service, Inc.
Aljazirah Insurance Company Limited (The)
Alte Leipziger Versicherung AG
American Title Insurance Company
Amtitle Company
Amtitle Trust Company
Associated Aviation, Inc.
Associated Title Services, Inc.
BHC Seguros de Vida
BHC Seguros Generales
Bayside Management Co.
Bayside Management Company Limited
Bayside Reinsurance Co. Ltd.
Bishophouse Limited
Boston Old Colony Insurance Company
Buckeye Union Insurance Company (The)
Buckhot, Inc.
Buffalo Reinsurance Company
CAFO, Inc.
Casualty Insurance Company
Cenguard Holding Corp.
Cenguard Insurance Corp.
CIC Acceptance Corporation
CIC Administrative Services, Inc.

CIC Asset Management Corporation
CIC Financial Corporation
Columbia Real Estate Title Insurance Company
Commercial Afianzadora, S.A.
Commercial Aseguradora Suizo Americana, S.A. (CASA)
Commercial Insurance Company of Newark, N.J.
Commercial Life Insurance Company
Continental Center Associates
Continental Holdings (Bermuda) Ltd.
Continental Holdings, Ltd.
Continental Corporation (The)
Continental Hellas Insurance Company S.A. (The)
Continental Insurance Company (The)
Continental Insurance Company of Canada (The)
Continental Insurance Company (Europe) Ltd. (The)
Continental Insurance Company of New Jersey (The)
Continental Insurance Company (U.K.) Ltd. (The)
Continental International Life Insurance Company
Continental Life Insurance PLC
Continental Life (International) Ltd.
Continental National Life Insurance Company
Continental Pensions PLC
Continental P.H.I. PLC
Continental Reinsurance Corporation
Continental Reinsurance Corporation (Bermuda) Ltd.
Continental Reinsurance Corporation (U.K.) Limited
Continental Risk Services, Inc.
Continental Risk Services, Ltd. (Bermuda)
Continental Risk Services (Cayman) Ltd.
CPI Group Inc. (The)

CPI Pension Services Inc.
Ctek, Inc.
C&W Title Insurance Company
Deutsche Continental Reinsurance, A.G.
Dominion Insurance Corporation (The)
Federal Underwriters General Agency, Inc.
Fidelity and Casualty Company of New York (The)
Firemen's Insurance Company of Newark, New Jersey
First Fire & Casualty Insurance Company of Hawaii
First Indemnity Insurance Company of Hawaii
First Insurance Company of Hawaii, Ltd.
General Financial Insurance Corporation
Glen Falls Insurance Company (The)
Global Marine Services, Ltd.
Gulf Stream Title Co. of Miami
Hallmark Insurance Company
Harbor Insurance Company
Hull & Cargo Surveyors, Inc.
Insurnet, Incorporated
International Central Bank & Trust Corporation
International Trust Corporation of Illinois
Ivanhoe Reinsurance Co. Limited (The)
Ivanhoe Reinsurance Co., Limited (Bermuda) (The)
Kansas City Fire and Marine Insurance Company
La Intercontinental de Seguros, S.A.
Land Title Company of Florida, Inc.
La Venezolana De Seguros S.A.
Lombard Insurance Companies
Lombard Insurance Group, Inc.
Loyalty Life Insurance Company

J. M. Lydgate California, Inc.
J. M. Lydgate, Limited
Maiden Lane Life Insurance Company
Maiden Lane Syndicate Inc. (The)
Marine Office of America Corporation
Marine Office of America Corporation (Canada)
Marine Office of America Corporation (U.K.) Ltd.
Mayflower Insurance Company, Ltd. (The)
National-Ben Franklin Insurance Company of Illinois
National Life Assurance Company of Canada (The)
Niagara Fire Insurance Company
Pacific Insurance Company
Pan American Finance Company
PanFinancial Insurance PLC
Phoenix Brasileira CIA de Seguros Gerais
Phoenix Continental, S.A.
Phoenix Continental Management Limited
Phoenix Latino, S.A.
Phoenix of Jamaica Assurance Co., Ltd.
Preferred Risk Insurance Company
Promotora Continental, S.A.
Puerto Rican-American Corporation
Puerto Rican-American Insurance Company
Puerto Rican-American Life Insurance Company
Puerto Rican Insurance Agency, Inc.
Revolution Oil Corporation
S & C Purchasing Corporation
Saudi Continental Insurance Company, E.C.
SCH Realty Leasing Company
Security National Life Insurance Company

Seguros Universales, S.A.
Servicios Continental, S.A.
Servicios, y Comisiones Continental S.A. de C.V.
Societe Nouvelle D'Assurances Du Cameroun (S.N.A.C.)
South Place Syndicate Inc.
Special Risk Syndicate Inc.
Sud Atlantica Compania De Seguros, S.A.
TCC Acquisition Corp.
TCC Properties Inc.
The 180 Group, Inc.
Title Insurance Corporation of Pennsylvania (The)
UAC Rehabilitation International, Inc.
UAC Services Ltd.
Underwriters Adjusting Company
Underwriters Adjusting Company (New York)
Unionamerica Insurance Company, Ltd.
Unionamerica Management Co. Limited
United States P & I Agency, Inc.
Verzekering Maatschappij Minerva N.V. Phoenix
William Penn Life Assurance Company of America
William Penn Life Insurance Company of New York.

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CONTINENTAL INSURANCE COMPANIES,
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and

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a declaratory judgment action brought under the district court's diversity jurisdiction. It requires the interpretation of three virtually identical Comprehensive General Liability ("CGL") insurance policies negotiated between Continental Insurance Companies ("Continental") and Northeastern Pharmaceutical and Chemical Company, Inc. ("NEPACCO"). The policy periods ran from

August 5, 1970 to August 5, 1971, August 5, 1971 to August 5, 1972 and from August 5, 1972 to November 17, 1972. In the CGL policies, Continental agreed, among other things, to pay on behalf of the insured, NEPACCO, all sums which NEPACCO should become legally obligated to pay as damages because of bodily injury or property damage. Complaint for Declaratory Judgment ¶ 15, *Continental Insurance Cos. v. NEPACCO*, No. 84 5034-CV-S-4 (W.D. Mo. filed June 25, 1985). (Pet. App., pp. 91-92).

In 1982, the United States of America sued NEPACCO and others, including former officers and directors of NEPACCO, pursuant to Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6973, and Sections 104, 106(a) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9604, 9606(a) and 9607(a), alleging that they had caused an "endangerment to health and the environment". First Amended Complaint ¶ 1, *United States v. Northeastern Pharmaceutical & Chemical Co. Inc., et al.*, No. 80-5066-CV-SW (W.D. Mo.) (the *"EPA"* lawsuit). The State of Missouri was not a party to the *EPA* lawsuit. Continental denied any obligation to defend or indemnify NEPACCO or its directors or officers in the *EPA* action, but provided NEPACCO and the defendant officers and directors with a defense to such lawsuit under a reservation of rights.

In January 1984, the United States District Court for the Western District of Missouri held NEPACCO and several other defendants strictly liable for cleanup costs under CERCLA, but not under RCRA. *United States v. NEPACCO*, 579 F. Supp. 823, 845 (W.D. 1984). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision as to liability

under CERCLA but held that the defendants were also liable under RCRA. *United States v. NEPACCO*, 810 F.2d 726, 741 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

In 1983, the State of Missouri (the "State") sued NEPACCO and other defendants, seeking declaratory judgment and recovery of present and future response costs ("cleanup costs") pursuant to CERCLA and the common law of public nuisance, in relation to the State's cleanup of a certain site. *Missouri v. Independent Petrochemical Corp.*, No. 83-2670-C (E.D. Mo. filed Nov. 23, 1983) (*IPC*).

To obtain certainty as to its obligations concerning the *EPA* case, Continental brought this action in February of 1984 against NEPACCO and its directors and officers in the United States District Court for the Western District of Missouri, invoking that court's diversity jurisdiction. In November 1984, Continental filed a motion for summary judgment.

In December 1984, the State of Missouri sought leave to intervene in Continental's declaratory judgment action, which was granted by the district court in January 1985. The State filed a counterclaim against Continental for recovery of the State's cleanup costs in the *IPC* case. In March 1985, the State filed its suggestions in opposition to Continental's motion for summary judgment.

In June 1985, the district court entered summary judgment in favor of Continental relating to recovery of the cleanup costs sought in the *EPA* lawsuit and on the State's counterclaim relating to recovery of cleanup costs in the *IPC* lawsuit.

A panel of the United States Court of Appeals for the Eighth Circuit reversed the district court's decision as to Continental's coverage liability for the *EPA* cleanup costs.

It affirmed, however, the district court's decision in favor of Continental relating to the *IPC* lawsuit.[1]

Upon rehearing *en banc*, the Eighth Circuit Court of Appeals, in a five-to-three decision, affirmed the district court's order of summary judgment in favor of Continental, holding that in the insurance context, the word "damages" is an unambiguous term which does not include claims for equitable relief. *Continental v. NEPACCO*, 842 F.2d 977, 985 (8th Cir. *en banc* 1988). (Pet. App., p. 18). The Eighth Circuit denied the State's motion for re-rehearing *en banc*.

The State of Missouri then petitioned for a writ of certiorari, seeking review in this Court of the Eighth Circuit's ruling *en banc*.

SUMMARY OF ARGUMENT

The writ should be denied. This diversity case presents a state law question of private contract interpretation, over which the exercise of this Court's certiorari power is neither appropriate nor necessary. The interpretation under Missouri law of the terms of the parties' negotiated insurance policy is far removed from the role of this Court.

Neither of the claimed questions presented for review by the State fall within the considerations governing review on certiorari by this Court as set forth in Rule 17 of

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1. The Eighth Circuit held that Continental was under no duty to defend or indemnify NEPACCO for liability arising out of the *IPC* lawsuit because the initial deposition of alleged toxic substances had first occurred on the site in question in 1974, two years after the third CGL policy had been cancelled. *Continental v. NEPACCO*, 811 F.2d 1180, 1192 (8th Cir. 1987). This ruling was not disturbed by the Eighth Circuit *en banc*.

the Supreme Court Rules. The ruling of the Eighth Circuit Court of Appeals in this case in no way involves a federal question, as referred to in Rule 17.1(a) and (c). Additionally, the State has not claimed that in reaching its opinion, the Eighth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . ." as set forth in Rule 17.1(a). Finally, the State does not and cannot claim that the decision of the Eighth Circuit is in conflict with a decision of another federal court of appeals on the same matter, as provided in Rule 17.1(a). In fact, this Court recently denied a petition for a writ of certiorari in a remarkably similar case in which the United States Court of Appeals for the Fourth Circuit reached an identical ruling, under Maryland law. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988).

The State attempts to bypass the traditional rule that this Court will not review federal appellate decisions on questions of state law by raising a well settled issue of federal procedure. It argues that the Eighth Circuit improperly affirmed summary judgment in favor of Respondent by relying on a ground not addressed by the district court. The propriety of the Eighth Circuit's action is an issue which has long been settled by this Court and followed with uniformity by all circuits and is therefore not worthy of review.

The State similarly attempts to raise a procedural issue by arguing that the Eighth Circuit should have remanded this case to the district court so that evidence could be taken as to the meaning of the term "damages" in the insurance policies in question. In apparent support of this argument, the State cited in its Petition and included in

its Appendix various materials which were not part of the record in the district court and are simply selective excerpts of irrelevant discussions and proceedings totally unrelated to this case. Not only is the submission of these extra-record materials impermissible as a matter of procedure, they are also irrelevant and inadmissible, as a matter of law, on the issue on which they are offered. It is well settled that extrinsic evidence cannot be used to create an ambiguity where none exists, but only to interpret an ambiguity where one exists. The Eighth Circuit has already determined that no such ambiguity exists.

The State's final effort to fashion an issue worthy of certiorari is equally unavailing. It argues that the Eighth Circuit's decision deprives it of the possibility to replenish its waste remedial fund at the expense of Continental. (Petition at 23). The State also claims that the Eighth Circuit's decision must be reversed as a matter of national policy because it encourages insurance companies to deny coverage nationwide. (*Id.* at 23-24). The State's argument has no rational basis. Plainly stated, the State asks this Court to espouse the standard that, no matter what the law is, the "deep pocket" should always have to pay. The interpretation of contractual agreements, however, is governed by the law, and not by irrelevant claims as to the respective financial positions of the contracting parties.

The State of Missouri suggests no reason why this Court should review the Eighth Circuit's decision affirming summary judgment in favor of Continental. There is none.

THE WRIT SHOULD BE DENIED

I. The Interpretation Under State Law of a Comprehensive General Liability Insurance Policy Negotiated Between Two Private Parties Is Not an Issue Warranting Certiorari.

This is a diversity case in which the United States Court of Appeals for the Eighth Circuit and the United States District Court for the Western District of Missouri interpreted, under Missouri law, the terms of an insurance contract negotiated between NEPACCO and Continental. Although the Eighth Circuit affirmed the district court's decision on a different ground, it expressly grounded its decision on the insurance law of the State of Missouri. In doing so, the Eighth Circuit squarely followed the doctrine expressed in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The *Erie* doctrine does not require a federal court sitting in diversity to adopt one of the parties' position. It simply requires the court to declare what it believes the state law is, as expressed by the highest court of that state, or would be on a question which has not been ruled upon by the state supreme court. This is exactly the rule that the Eighth Circuit applied. It commented at length on Missouri law before reaching its conclusion. *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 983-86 (8th Cir. *en banc* 1988). (Pet. App., pp. 13-17).

This Court repeatedly has stressed that its role is not to review federal appellate courts' decisions on matters of state law. *E.g., Cort v. Ash*, 422 U.S. 66, 73-74 n.4b (1975); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *Hudleston v. Dwyer*, 322 U.S. 232, 237 (1944). There is no reason to depart from that traditional rule here. This Court has

consistently denied certiorari in insurance coverage disputes governed by state law and arising in diversity cases.[2] In fact, very recently, this Court refused to review a case presenting the identical issue and reaching the identical result regarding the interpretation of the term "damages" in an insurance policy, under the law of Maryland. In interpreting identical policy language, the Fourth Circuit held that the term "damages" did not afford coverage for a lawsuit seeking equitable, injunctive and restitutionary relief pursuant to CERCLA and RCRA. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988). Under the Court's longstanding approach, this case likewise does not warrant certiorari.

II. The Propriety of the Eighth Circuit Affirming on a Different Ground the District Court's Summary Judgment Is a Settled Issue Which This Court Has No Reason to Review.

The Eighth Circuit *en banc* affirmed the district court's summary judgment in favor of Continental on the ground that in the insurance context, the term "damages" has an unambiguous meaning which covers legal damages and not cleanup costs which are equitable in nature. *Continental Insurance Cos. v. NEPACCO*, 842 F.2d 977, 985 (8th Cir. *en banc* 1988). Although this particular issue was not

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2. *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, ... U.S. ....., 107 S. Ct. 940 (1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1009 (1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

addressed by the district court, the Eighth Circuit held that the issue was properly before it.

It is a well-settled rule that if the decision of the court below is correct, the reviewing court must affirm it, even if on different grounds than those relied upon by the lower court. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). This rule applies to review of summary judgments: "[t]he appellate court does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law. . . ." 10 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2716 (1983). In this case, the Eighth Circuit has made a routine application of a principle of appellate procedure followed by all federal appellate courts. *Kuehn v. Garcia*, 608 F.2d 1143, 1146 (8th Cir. 1979); *United States Gypsum Co. v. Greif Brothers Cooperage Corp.*, 389 F.2d 252, 262 (8th Cir. 1968) (citations omitted).[3] The State offers no reason why this well-settled rule should be reconsidered by this Court. There is none.

In its petition, the State basically argues the merits of the Eighth Circuit's decision. This is not the proper time or stage of these proceedings to make such argument. Even on the merits of the case, however, the Eighth Circuit's decision is clearly correct. The rules of construction of an insurance contract require that its language be

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3. *See also Gimix, Inc. v. J S & A Group, Inc.*, 699 F.2d 901, 904 (7th Cir. 1983); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 359 (7th Cir. 1983); *Herm v. Stafford*, 663 F.2d 669, 684 (6th Cir. 1981); *Reynolds v. United States*, 643 F.2d 707, 710 (10th Cir. 1981); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 682 (9th Cir. 1976).

given its plain meaning and if the language is unambiguous, the contract must be enforced according to such language. *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695, 698 (Mo. *en banc* 1982). Whether the language of a contract is unambiguous is a question of law for the court. *In re Bergmann v. Bergmann*, 740 S.W.2d 215, 216 (Mo. App. 1987); *Busch & Latta Painting v. State Highway Com'n*, 597 S.W.2d 189, 197 (Mo. App. 1980). If the court finds the contract unambiguous, the court will state the contract's meaning as a matter of law. *Busch & Latta Painting v. State Highway Com'n, supra*, at 198. In the insurance context, courts generally agree that under liability insurance policies the word "damages" has an accepted technical meaning in law which does not cover equitable and restitutionary relief. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988); *Aetna Casualty & Surety Company v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955). This position is followed by a majority of federal and state courts.[4] Therefore, the

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4. *Battisti v. Continental Cas. Co.*, 406 F.2d 1318, 1320 (5th Cir. 1969) (noting limitation on coverage to suits "seeking damages" in case where complaint amended to add prayer for damages); *National Ins. Co. v. King*, 673 F. Supp. 384, 387 (S.D. Cal. 1987) (no duty to defend claims for equitable or restitutionary relief); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601, 604, 606 (D. Utah 1982) (insurers' contractual duties extend to damage claims and "not to claims seeking an injunctive form of relief"); *Board of County Comm'rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 408 (D. Colo. 1981) (no coverage for attorneys fees in suit for declaratory and injunctive relief); *County of Suffolk v. Royal Globe Ins. Co.*, 1981 Fire & Casualty Cas. (CCH) 1457, 1459 (E.D.N.Y. 1981). Insurer had a duty to defend because plaintiffs sought damages, not injunctive relief); *City of Thief River Falls v. United Fire & Casualty Co.*, 336 N.W.2d 274, 275-76 (Minn. 1983) (no coverage for suit seeking mandamus); *O'Neill Investigations, Inc. v. Illinois*

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Eighth Circuit properly found that, under Missouri law, the term "damages" in a CGL insurance contract has an unambiguous meaning, and does not cover equitable claims for cleanup costs.

III. Extrinsic Evidence Cannot Be Used to Create an Ambiguity Where None Exists.

In addition to arguing the merits of the Eighth Circuit's decision, the State also argues that the Eighth Circuit improperly affirmed summary judgment because the case should have been remanded to the district court to receive evidence on the meaning of the term "damages." (Petition at 13-15). Further, while recognizing that this Court "is not the appropriate forum in which to present

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Footnote continued—

Employers Ins., 636 P.2d 1170, 1177 (Alaska 1981) (no coverage for suit for injunctive relief and restitution); *Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 504 P.2d 1139, 1143 (Wa. *en banc* 1973) (no coverage for suit for injunctive relief and restitution); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (N.H. 1954) (no coverage for costs of complying with mandatory injunction); *International Mineral and Chem. Co. v. Liberty Mut. Ins. Co.*, No. 84-L-50979 (Cir. Ct. Cook Cty. Ill., Jan. 6, 1987), *aff'd*, No. 87.0505 (Ill. App. 1 Dist. March 25, 1988) (no coverage for equitable CERCLA claims); *Jaffe v. Crawford Ins. Co.*, 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (1985) (no coverage for suit seeking restitutionary payment); *Gulf & Western Indus., Inc. v. Seaboard Sur. Co.*, 100 A.D.2d 820, 474 N.Y.S.2d 754, 755 (1st Dept. 1984), *appeal dismissed*, 63 N.Y.2d 675, 494 N.Y.S.2d 1060, 484 N.E.2d 1058 (1984), *reargument denied*, 63 N.Y.2d 771, 494 N.Y.S.2d 1030, 484 N.E.2d 1054 (1984) (no coverage for costs of complying with injunctive provisions of consent judgment); *Board of Ed. v. Country Mut. Ins. Co.*, 121 Ill. App. 3d 124, 459 N.E.2d 273 (1984) (no coverage in suit for writ of mandamus and injunctive relief); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 391 N.E.2d 568, 573 (1979) (no coverage for suit seeking injunction directing insured to remove debris encroaching on railroad's right-of-way); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So.2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery).

new evidence to resolve this factual dispute" (Petition at 15, n.22), the State nevertheless submits and argues the contents of unauthenticated materials which were not part of the district court record below. In so doing, the State ignores the rule that the record on appeal is composed of the original papers and exhibits filed in the district court. *Rebuck v. Fogel*, 713 F.2d 484, 486 (8th Cir. 1983); *see also, United States v. Drefke*, 707 F.2d 978, 983 (8th Cir. 1983). For these reasons, Continental objects to the attempted use of these materials by the State, which are all selective and unauthenticated excerpts of irrelevant discussions and proceedings totally unrelated to this case.[5]

The State apparently offers these materials on the "factual issue" of the definition of the term "damages" in the insurance policies in question. In its *en banc* decision of February 26, 1988, the Eighth Circuit ruled, as a matter of law, that the term "damages" in the insurance context is unambiguous. (Pet. App., p. 18). Under Missouri law, whether a contract is ambiguous is a question of law for the court. *In re Bergmann v. Bergmann*, 740 S.W.2d 215, 216 (Mo. App. 1987). Once the court finds that a contract is unambiguous, extrinsic evidence may not be introduced as to the terms of such contract and must be disregarded as a matter of law. *Southgate Bank & Trust Co. v. Axtell*, 710 S.W.2d 247, 253 (Mo. App. 1986), citing *Harper v. Calvert*, 687 S.W.2d 227, 230 (Mo. App.

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5. The materials cited by the State and included in its appendix, which were not part of the record in the district court below, are: (1) Agenda and Minutes—Meeting of the General Liability Governing Committee—October 28, 1969 (Pet. App., pp. 115-119); (2) Commercial General Liability Coverage Form (Pet. App., p. 120); (3) Excerpts From Reporters' Transcript of Proceedings, March 7, 1988 (Pet. App., pp. 121-123); and (4) Excerpts From Reporters' Transcript of Proceedings, March 8, 1988. (Pet. App., pp. 124-127).

1984). This is of particular application to insurance contracts. *Hartford Accident & Indemnity Co. v. Farmington Auction, Inc.*, 356 S.W.2d 512, 520 (Mo. App. 1961). The attempted submission of these extra-record materials by the State is not only procedurally improper, the materials are irrelevant and inadmissible as a matter of law. Notwithstanding the procedural and substantive impropriety of the State's argument on this point, it completely fails to raise an issue warranting certiorari.

IV. The State's Suggestion That the Eighth Circuit's Decision Should Be Reversed As a Matter of National Policy Is Totally Without Merit or Substance.

Failing to provide this Court with any ground for certiorari on the basis of interpretation of a state law issue, the State of Missouri complains of a purported conflict between the Eighth Circuit's decision and the interest of other states and the federal government.

The State's complaint is twofold. First, it argues that because parties liable for the environmental pollution are in many cases defunct, "[u]nder the Eighth Circuit's interpretation of the term 'damages' in the standard-form CGL insurance policy, . . . potential sources of reimbursement suddenly have evaporated". (Petition at 23). In addition, the State complains that the Eighth Circuit's decision may produce a uniform result nationwide because it "already is being cited by insurance companies throughout the nation seeking to avoid providing coverage under the standard-form policies they issued to companies" liable for cleanup costs. (Petition at 23-24). The State urges that it is "improper and unfair" to allow the Eighth Circuit's decision to stand. (*Id.* at 24).

Not only is the State's argument a blatant invitation to judicial social engineering, it also ignores the implications of the *Erie* doctrine. In essence, the State asks this Court to dispense with the terms of contracts and with contract law standards to formulate a "deeper pocket" standard obliging insurance companies to financially support the State. Under the State's approach, no matter what the terms of a contract are or what the law is, any "potential sources of reimbursement" should have to pay. Merely restating the State's argument illustrates its fallacy.

Furthermore, the State's assertion that the Eighth Circuit's decision has a "potentially widespread effect" (Petition at 24, fn. 34) is ill-founded. The Eighth Circuit's decision merely applied Missouri law to the terms of the insurance policies before it. Other state or federal courts asked to determine the same or a similar issue will make decisions based upon applicable state law and insurance policies before them.

In essence, the State treats the Eighth Circuit's decision as if it were the first of its kind and an exceptional one. However, at least four state supreme courts,[6] intermediate appellate courts in four other states,[7] and, in addi-

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6. *City of Thief River Falls v. United Fire & Casualty Co.*, 336 N.W.2d 274, 275-76 (Minn. 1983) (no coverage for suit seeking mandamus); *O'Neill Investigations, Inc. v. Illinois Employers Ins.*, 636 P.2d 1170, 1177 (Alaska 1981) (no coverage for suit for injunctive relief and restitution); *Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 504 P.2d 1139, 1143 (Wa. *en banc* 1973) (no coverage for suit for injunctive relief and restitution); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (N.H. 1954) (no coverage for costs of complying with mandatory injunction).

7. *International Mineral and Chem. Co. v. Liberty Mut. Ins. Co.*, No. 84-L-50979 (Cir. Ct. Cook Cty. Ill., Jan. 6, 1987),

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tion to the ruling in this case, at least six other federal courts,[8] including the United States Court of Appeals for the Fourth Circuit,[9] support the finding, as expressed by the Eighth Circuit that "black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." *Continental Insurance Cos. v. NEPACCO.* (Pet. App., p. 18). Far from

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Footnote continued—

aff'd, No. 87.0505 (Ill. App. 1 Dist. March 25, 1988) (no coverage for equitable CERCLA claims); *Jaffe v. Crawford Ins. Co.*, 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (1985) (no coverage for suit seeking restitutionary payment); *Board of Ed. v. Country Mut. Ins. Co.*, 121 Ill. App. 3d 124, 459 N.E.2d 273 (1984) (no coverage in suit for writ of mandamus and injunctive relief); *Gulf & Western Indus., Inc. v. Seaboard Sur. Co.*, 100 A.D.2d 820, 474 N.Y.S.2d 754, 755 (1st Dept. 1984), *appeal dismissed*, 63 N.Y.2d 675, 494 N.Y.S.2d 1060, 484 N.E.2d 1058 (1984), *reargument denied*, 63 N.Y.2d 771, 494 N.Y.S.2d 1030, 484 N.E. 2d 1054 (1984) (no coverage for costs of complying with injunctive provisions of consent judgment); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 391 N.E.2d 568, 573 (1979) (no coverage for suit seeking injunction directing insured to remove debris encroaching on railroad's right-of-way); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So.2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery).

8. *Battisti v. Continental Cas. Co.*, 406 F.2d 1318, 1320 (5th Cir. 1969) (noting limitation on coverage to suits "seeking damages" in case where complaint amended to add prayer for damages); *Aetna Cas. & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (no coverage for suit seeking injunctive relief); *National Ins. Co. v. King*, 673 F. Supp. 384, 387 (S.D. Cal. 1987) (no duty to defend claims for equitable or restitutionary relief); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601, 604, 606 (D. Utah 1982) (insurers' contractual duties extend to damage claims and "not to claims seeking an injunctive form of relief"); *Board of County Comm'rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 408 (D. Colo. 1981) (no coverage for attorneys fees in suit for declaratory and injunctive relief); *County of Suffolk v. Royal Globe Ins. Co.*, 1981 Fire & Casualty Cas. (CCH) 1457, 1459 (E.D.N.Y. 1981) (the insurer had a duty to defend because plaintiffs sought damages not injunctive relief).

9. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988).

setting new legal standards, the Eighth Circuit has merely followed traditional insurance law found both in Missouri and elsewhere.

CONCLUSION

For all the reasons set forth above, the State of Missouri's petition for a writ of certiorari should be denied.

Respectfully submitted,

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